K.T.I., INC. 1293

K.T.I., Inc. *and* Waste Material, Recycling, and General Industrial Union, Local 108, L.I.U.N.A., Petitioner. Case 22–RC–11766

April 20, 2000

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered the attached Acting Regional Director's report (relevant portions of which are attached as an appendix) recommending disposition of the Petitioner's objections to an election held July 30, 1999. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 32 for and 40 against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

Having reviewed the exceptions and briefs, the Board adopts the Acting Regional Director's findings and recommendation, and finds that the election must be set aside and a new election held.

In directing a second election, we rely solely on the Acting Regional Director's finding that the Region failed to take any steps to address the problem with the Excelsior list until July 29, 1999, the day before the election, despite the Petitioner having complained of the problem no later than a full week before the election and perhaps as much as 2 weeks. Therefore, we find it unnecessary to rely on the Acting Regional Director's findings about the Employer's conduct. In setting aside the election, we are not making any findings as to the accuracy of the list or whether the Employer could have taken steps to correct the list. Rather, we find that the Petitioner reasonably assumed that the returned envelopes indicated that the addresses provided were incorrect and therefore did not seek assistance from the Postal Service or contact employees in an alternative manner, such as home visits. If the Regional Office had acted promptly there would have been a timely determination as to whether that assumption was accurate. If the list had errors there would have been an opportunity to correct the errors. If the list was correct, the Petitioner could have taken the matter up with the postal authorities or taken other steps to contact the voters. Either way the Petitioner could have acted in an informed manner. The Regional Office's delay prevented that.² Under these circumstances, we agree with the Regional Director that the Petitioner was prevented from making full use of the *Excelsior* list to inform employees of the arguments concerning representation and that the election must be set aside.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting.

My colleagues have set aside the election solely on the basis of the Region's failure to take action at a time earlier than July 29 (the day before the election). However, it is far from clear that earlier action by the Region would have made any appreciable change in the *Excelsior* situation. More particularly, it is not clear what steps the Employer could have taken in response to earlier Regional action, or whether such steps would have led to the prompt delivery of union mailings. There are a myriad of factual issues that bear on these matters, and none are resolved. Thus, I would remand this objection for a hearing along with any other objections that the Regional Director concludes warrant a hearing.

I do not disagree with my colleagues' observation that the Petitioner was reasonable in contacting the Regional Office with respect to the possible problem with the addresses. Nor do I disagree with the contention that the Regional Office should have contacted the Employer as soon as the Petitioner alerted the Regional Office in this regard.² However, the issue here is whether that Regional Office's failure resulted in an invalid election. As noted above, there are factual questions as to this issue. That is, it may well be that, even if the Region had acted promptly, the Union would have been left with the very same addresses. In this regard, the Employer asserts that it promptly checked its files and its W-4s, and found that these were the addresses that it had previously provided. Absent an obligation to go to the employees for updates, it would appear that the addresses provided to the Union would not have changed. Finally, particularly where, as here, the fault lies with the Region (rather than with the Employer), we must tread very carefully before taking away the election result that favored the Employer's position.³ In these circumstances, and given the factual

¹ We make no findings as to whether the Petitioner was obligated to complain to the Region to preserve its *Excelsior* obligation. Rather, we find that where, as here, the Petitioner does complain, the Region is obligated to promptly contact the Employer to attempt to ascertain whether the list was accurate. This the Region failed to do.

² See, e.g., *Coca-Cola Co.*, 202 NLRB 910 (1973) (where the union's failure to receive the *Excelsior* list was due to a letter misaddressed by the Regional Office, the Board concluded that the union was prejudiced by the late receipt of the list); *McGraw Edison*, 234 NLRB 630 (1978) (where the union's late receipt of the *Excelsior* list was due

to delays of the U.S. Postal Service and the Board's own error, the Board found grounds for setting aside the election); and *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998), (where the Region did not immediately mail the *Excelsior* list to the union, the Board set aside the election, finding that "the relevant inquiry is whether the delay—however caused—interfered with the purpose behind the *Excelsior* requirements").

¹ For example, it may be that the Employer's listings were current, and/or that all or most of the addresses were in fact accurate.

² Significantly, this is not a case where the employer failed to promptly act when informed of alleged inaccuracies on the *Excelsior* list. Cf. *Medtrans*, 326 NLRB 925 (1998).

³ Indeed, inasmuch as it was the Region, rather than the Employer, that failed to promptly act, I find that the election should be set aside only if the evidence adduced at the hearing shows that the Union was materially prejudiced by that conduct. See generally my dissent in *Alcohol & Drug Dependency Services*, 326 NLRB at 519–520 (1998).

issues, we should not overturn the election results without giving the Employer an opportunity for a hearing.

APPENDIX

REPORT ON OBJECTIONS

Objection No. 2

In this objection, the Petitioner contends that the Employer failed to provide an accurate *Excelsior* list, ² thereby affecting the Petitioner's ability to communicate with prospective voters. The Employer denies any wrongdoing and asserts that it provided the Board, pursuant to its *Excelsior* rule, with the names and "most recent addresses that were on file with the Employer."

In support of this objection, the Petitioner proffered 34 envelopes which had been addressed to employees whose names and addresses were contained on the Excelsior list submitted by the Employer. These 34 envelopes were returned to the Petitioner by the Postal Service as undeliverable.³ The investigation further revealed that shortly after the list was provided to the Petitioner on July 6, 1999, the Petitioner's counsel contacted the Region to advise that the Petitioner had begun to receive a number of envelopes back from the Postal Service. As best as can be determined, this contact occurred between July 16 and 23, 1999. Additionally, by letter dated July 22, the Petitioner's counsel notified the Region of the above situation and identified the names of 13 employees whose envelopes had been returned as well as including copies of 16 returned envelopes. The Petitioner's counsel asserts that its July 22 letter, sent by regular mail as well as by FAX transmission, was sent at the instruction of the Board agent it had earlier contacted, as described above. The Region received the Petitioner's July 22 letter on July 27, 1999, 3 days before the election.⁵ The Board agent, who had made arrangements for the election, recalls receiving a phone call from the Petitioner's counsel on or about July 23, 1999, and also receiving a copy of the FAX transmission on either July 23 or 26, 1999. Her recollection is that she forwarded the FAX to the Board agent conducting the election for followup.

On July 29, 1999, the Board agent conducting the election had a telephone conversation with the Employer's attorney regarding the problems associated with the returned envelopes. The Employer's counsel related that in a prior conversation with the Petitioner's counsel, 6 he had advised the Petitioner's counsel that the Employer had used the most recent addresses it

See also Red Carpet Bldg. Maintenance Corp., 263 NLRB 1285 (1982).

had in the preparation of the list. Thereafter, by letter dated July 29, the day prior to the election, the Employer's counsel advised the Region and the Petitioner's counsel that he had the Employer "recheck the records that they maintain to verify the addresses that were provided to you on the *Excelsior* list." The letter continued, "the address for the thirteen employees in question are the most current addresses on file." The Employer's counsel admits that the Employer took no action other than reviewing its records to verify the information it had earlier provided. In total, it appears that 33 of 96 envelopes or 34 percent were returned as undeliverable because of faulty addresses.

The Board has long required under its Excelsior rule that an employer file with the Regional Director conducting a representation election an alphabetized list containing the names and address of all eligible voters. Further, the Board has held that it is critical that the information on the Excelsior list be "complete and accurate so that the union may have access to all eligible voters," in order "to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights." In Medtrans, 326 NLRB No. 79 [925] (1998), the Board set aside an election where a union to a representation election reported that the Excelsior list contained numerous incorrect addresses and requested an updated list. When advised of the problems with its list, the employer in Medtrans did nothing to correct the list despite a policy that employees report address changes to it. While in the instant case, there is no evidence that the Employer has a similar policy, when advised of the inaccuracies in the list, it merely "rechecked" its own records rather than attempt to obtain updated information. As it appears, the Petitioner attempted to notify both the Region and the Employer as soon as it began to become aware of the returned mailings, it does not appear that either the Region or the Employer were as responsive as they could have been. Thus, the Employer made no attempt to obtain directly from any of the 13 identified employees their correct addresses. Similarly, it does not appear that the Region took any steps to address the Petitioner's concerns until July 29, the day before the election, despite becoming aware of the problem no later than a full week before the election and perhaps as much as 2 weeks. In Alcohol & Drug Dependency Services, 326 NLRB No. 58 [519] (1998), a Regional Director recommended that an election be set aside where, as a consequence of the Region's actions, a union did not receive an Excelsior list until 7 days prior to a scheduled election. The Employer excepted to the Regional Director's recommendation, arguing that there was neither a claim nor any evidence of prejudice to the union by the late receipt of the list. The Board, notwithstanding, set aside the election holding that the relevant inquiry is not the cause of the delayed receipt, but whether the purpose behind the Excelsior requirement "of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights," has been met. Thus, I find that regardless of the cause for the substantial inaccuracies contained on the list the Petitioner sought to obtain

² Excelsior Underwear, Inc., 156 NLRB 1236 (1966).

³ The majority was stamped "Attempted—Not Known," but others were marked "No Such Address" or "Moved, Left No Address." One, however, was incorrectly addressed by the Petitioner.

⁴ Although naming 13 employees, the Petitioner attached 16 envelopes that had been returned as undeliverable.

⁵ A record of the FAX transmission cannot be confirmed as the Region's incoming FAX machine had been out of service the week of July 19, and was not repaired until 12:37 p.m. on July 22. Further, upon repair, it was discovered that the incoming phone line was not operational and was not corrected until July 26 at 9:12 a.m.

⁶ The Petitioner's counsel asserts this conversation occurred on or about July 22. the Employer's counsel acknowledges a July 22 contact, but recalls only that the Petitioner's counsel complained of two or three returned envelopes.

⁷ Mod Interiors, Inc., 324 NLRB 164 (1997). See also North Macon Health Care Facility, 315 NLRB 359 (1994).

⁸ Of approximately 500 eligible voters, 94 mailings were returned for incorrect addresses or approximately 20 percent of the unit.

K.T.I., INC. 1295

an accurate list, but the Employer did not take the necessary steps to provide it.⁹ Nor does it appear that the Region acted with the necessary promptness to address this situation.¹⁰ Un-

der these circumstances, I cannot conclude that the electorate was fully informed of the arguments concerning representation and, thus, could not fully exercise their Section 7 rights. Accordingly, it is recommended that the election conducted on July 30, 1999, be set aside and a second election directed.

objection, 20 additional envelopes were returned for incorrect addresses. Thus, even assuming the 13 were corrected, more than 20 percent of the addresses would still have been inaccurate.

⁹ Cf. Bear Truss, Inc., 325 NLRB 1162 (1998).

¹⁰ I am not certain that even had the Region acted immediately after notification, the Union would have had an accurate list for the requisite period. In this regard, at the time of notification only 13 addresses needed correction. Pursuant to evidence submitted in support of this